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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

TEACHERS INSURANCE AND ANNUITY ASSOCIATION, AND COLLEGE RETIREMENT EQUITIES FUND,
*Petitioners,*
v.
DIANA L. SPIRT, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

ERWIN N. GRISWOLD
(Counsel of Record)
MARIANNE CORR
JONES, DAY, REAVIS & POGUE
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3898
*Counsel for the Amicus*

*Of Counsel:*
LINWOOD HOLTON
Vice President & General Counsel
JACK H. BLAINE
Chief Counsel, State
EDWARD J. ZIMMERMAN
Associate General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006-2284
(202) 862-4000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

1. Whether an order requiring the use of sex-neutral tables to calculate annuity benefit payments based on contributions made before this Court's *Norris* decision is consistent with the August 1, 1983, cut-off date prescribed in *Norris*.

2. Whether independent insurance carriers can be deemed "employers" of their insureds, thereby falling within the provisions of Title VII of the Civil Rights Act of 1964.

3. Whether Title VII supersedes the McCarran-Ferguson Act's reservation to the states of regulatory authority over the business of insurance.

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## BRIEF OF AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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This brief is filed on behalf of the American Council of Life Insurance, as amicus curiae, in support of the petition for certiorari. Consent from counsel for all parties has been filed with the Clerk of this Court.

### INTEREST OF THE AMICUS

The American Council of Life Insurance ("Council") represents the interest of 611 member life insurance companies, including most of the major life insurers in the United States. Its members currently hold more than 94 percent of the life insurance in force in legal reserve

life insurance companies in the United States. In addition, member companies account for 98.3 percent of the insured private pension plan business in the United States. Thus, the Council has a direct and immediate interest in insurance practices, in general, and in the sound administration of pension plans, in particular.

The pension industry is large and affects many individuals. At the end of 1982, 30.5 million Americans were covered by private pension plans administered by U.S. legal reserve life insurance companies. See American Council of Life Insurance, 1982 Pension Facts (1983 Update). Assets backing these plans reached $228.9 billion during that year. *Id.*

In any aspect of insurance, accurate risk classification is essential to maintaining the financial integrity of a finite fund subject to partial liquidation upon the occurrence of events such as death, retirement, or disability, which are unpredictable on an individual basis. Historically, sex-distinct actuarial tables have been used by virtually all insurance companies, including petitioners (TIAA-CREF), to classify participants for the purpose of purchasing insured pension benefits. Until this Court's decision in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), sex-distinct tables were used by a few pension plans to determine the amount of each participant's periodic contributions in order to provide equal periodic pension benefits on retirement; after the *Manhart* decision, the sex-distinct tables were used only to correlate the amount of periodic benefit payments under one or more payout options to the total amount contributed to a plan by or on behalf of each retiree.

As a result of this Court's recent decision in *Arizona Governing Committee v. Norris*, 103 Sup. Ct. 3492 (1983), employers subject to Title VII who provide pension benefits may not continue to use sex as a factor in determining the amount of periodic payments to retirees under employment plans. The impact of this change on

the management and operation of pension plans will be substantial; retroactive application of the *Norris* rule could impair the reasonable expectations of many prospective retirees.

Because it is concerned about safeguarding the financial integrity of employee benefit plans as well as protecting the legitimate and justifiable expectations of welfare and pension plan participants, the Council has a direct and immediate interest in the proper interpretation and implementation of the *Norris* decision.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 735 F.2d 23. An earlier opinion by the Second Circuit is reported at 691 F.2d 1054 (1982). The United States District Court for the Southern District of New York issued five opinions in this case: (1) January 23, 1976 (not officially reported); (2) July 1, 1976 (reported at 416 F. Supp. 1019); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298); and (5) March 19, 1982 (reported at 93 F.R.D. 627). Each of these opinions is set forth in the Appendix to the Petition.

## JURISDICTION

The judgment below was entered on May 21, 1984. The petition for certiorari was filed on July 11, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

1. Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1982), provides, in pertinent part:

It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

2. Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1982), provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . .

## STATEMENT

Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") provide insurance products (principally annuities) for faculty and staff members who are employed by more than 3,400 educational institutions in the United States. More than 700,000 persons hold retirement contracts in the TIAA-CREF system.

TIAA is a non-profit, legal reserve life insurance company which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching. TIAA provides annuities especially designed for employees of academic institutions. CREF, a companion organization, was created in 1952 by a special act of the New York State Legislature in order to furnish annuities which are backed by investments other than those traditionally permitted as reserves for annuities similar to those sold by TIAA. Both TIAA and CREF are closely regulated by the New York State Insurance Department and are subject to the New York Insurance Law.

Respondent, Diana L. Spirt, is a tenured professor at Long Island University ("LIU"). LIU has adopted a

retirement plan with policies written by TIAA-CREF, in which respondent is required to participate. Under the plan, the employee contributes 5 percent of his or her yearly salary. In addition, LIU contributes 5 percent of the first $4,800 of an employee's salary and 11 percent of an employee's earnings in excess of that amount. Thus, contributions by and on behalf of similarly situated male and female employees are equal in amount.

Each contribution received by TIAA-CREF purchases retirement benefits pursuant to separate annuity contracts between TIAA-CREF and each individual participant. The contract rights vest immediately and irrevocably in the individual employee. All annuity accumulations are "portable," i.e., the employee retains his or her ownership interest in the individual account whenever he or she transfers employment, in or out of higher education.

The benefits paid out to a retired participant are directly related to the total contributions to the plan made by and on behalf of that participant. In order to price their product accurately, and to ensure their continued solvency, TIAA and CREF used sex-specific mortality tables in calculating the amount of the monthly benefits, and so advised the participants. As a consequence, female participants historically received somewhat smaller monthly payments than similarly situated male retirees, reflecting the fact that women live longer than men. Although the monthly payments were smaller for women, the aggregate amount received by the average woman was greater than that received by the average man. The actuarial values of the annuity plans have always been identical for men and women.

Pursuant to this Court's decision in *Arizona Governing Committee v. Norris*, 103 Sup. Ct. 3492 (1983), TIAA and CREF have changed their plans so that unisex tables are used to calculate periodic benefit payments correlating to premiums received on and after August 1,

1983. The issue remaining is whether annuities already earned through premiums received by TIAA and CREF before that date (or before May 1, 1980) must likewise be determined on the basis of unisex tables, thus impairing the rights of men whose eventual retirement benefits were vested before August 1, 1983.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Deprives Male Policyholders of Contractual Interests Already Definitely Vested in Them

The real issue in this case is not between the respondent Spirt and LIU. The decision below imposes no financial liability on either LIU or TIAA-CREF. The issue here is, for practical purposes, between not-yet-retired male policyholders of TIAA-CREF, on the one hand, and female policyholders on the other. That issue is properly here since TIAA-CREF and LIU have a fiduciary responsibility to see that the rights of all policyholders in the case of TIAA, and employees in the case of LIU, are protected.

This Court's decisions in *Manhart* and in *Norris* turn on its conclusion that it is the *individual* who must be protected. In this case, prior to August 1, 1983, each policyholder, male or female, had a definite number of dollars held to his or her credit, and a contractual agreement that the total accumulation would be used, on retirement, to provide an annuity. It was clearly provided in the contractual papers that the annuity would be calculated on a sex-distinct basis. It is true that the contract did not provide an annuity of a predetermined number of dollars. This was for at least two reasons: *First*, the annuity was based on the aggregate number of dollars in the accumulation at the time of retirement, and this could not be predetermined, both because of variations in the amount of periodic payments credited to the account, and because of varying amounts credited to

the account from investments income; and *second*, because annuity tables are not frozen. They are subject to adjustment on the basis of experience; with respect to annuities which may be payable many years in the future, this is particularly important because, for example, of increased longevity, which has occurred in the past.

Despite the inability to determine the exact amount of future pension benefits, there was a clear contractual obligation to hold each participant's accumulation for his or her benefit, and to provide an annuity to each participant on a scientifically established annuity table, and it was clearly stated that this annuity would be based "on age and sex" of the policyholders; and sex was regularly taken into account in computing the information on prospective annuity payments which was annually made available to each policyholder.

Thus, prior to the *Norris* decision (which did not involve an insurance company) each policyholder in TIAA-CREF had a vested interest in a clearly established prospective annuity, and this annuity was agreed to be based on sex-distinct annuity tables.

The decision below does not harm TIAA-CREF or LIU. But it does take away from each male policyholder in TIAA-CREF a definite and material portion of his contracted-for annuity, and gives this amount to all women policyholders as a group. It cannot be said how much each woman policyholder will actually receive, for that will depend on how long she lives. But it is clear that this portion of what the women receive will come from the accumulations made by and for the men, and will deprive each man of a portion of the benefit which was due to him under his contract. In this connection it is relevant that the accumulations have often been made over long periods—twenty, thirty, or forty years, or more —and the contractual arrangements, including sex-based tables, were entered into long before the present question was ever raised.

That the lower court's decision results in a taking from the men—from each man—is clear and can be readily shown by an example. Suppose that TIAA-CREF (without any legislation) had reached the conclusion that, for any reason, it should change its liability to policyholders—male and female—under existing contracts from sex distinct annuity tables to unisex tables. Would it not be clear that this would have been a breach of contract, and that it could be enjoined at the suit of any one or more male policyholders, and, as well, at the suit of the New York Commissioner of Insurance? This would of course be because such action by TIAA-CREF would take away contractual rights from male policyholders and give them to women. The taking is no less real and no less severe when it is done by order of the court below. It is one thing to make such a change prospectively, as this Court clearly required in its *Norris* decision, and another thing to make the change applicable to already vested contractual rights, which is what is required by the decision of the court below.

It is currently estimated that in the case of TIAA-CREF alone, the order affirmed by the Second Circuit will require the transfer from men to women participants of $2 billion in reasonably expected benefits over the course of the affected male participants' lives. This figure, as indicated, represents the effect of the decision below on the TIAA-CREF plan alone. Without some clarification of *Norris*, other courts may accept the interpretation given that decision by the court below, causing the total economic impact of the lower court's opinion to expand substantially. This is indeed a ten billion dollar case.

The order of retroactive relief "attaches a new disability in respect to transactions . . . already past," *Lohf v. Casey*, 330 F. Supp. 356, 359 (D. Colo. 1971), *aff'd*, 446 F.2d 618 (10th Cir. 1972). The new disability is imposed on innocent people whose justifiable expectations with regard to the level of benefits they could expect to flow from their contributions will be disappointed.

The price of retroactive relief against the petitioners' plan is not made less significant (as suggested by the court below) by the fact that it will be borne by male annuitants, who are not parties to this case, rather than by the petitioners, who have a fiduciary responsibility for them.

No question is raised here as to the power of governmental authority to make the change involved here with respect to future premium payments. The issue here relates entirely to the retroactive effect of the decision of the court below. Indeed, the question was clearly decided by this Court in its judgment in the *Norris* case. Justice O'Connor, who cast the deciding vote on both aspects of the *Norris* decision, wrote—and this was specifically concurred in by Justice Powell, 103 Sup. Ct. at 3510, n.12, speaking for four members of the Court—

> For contributions collected before the effective date of our judgment, however, I would allow employers and *participating insurers* to calculate the resulting benefits as they have in the past. [Emphasis supplied.]

103 Sup. Ct. at 3512-13.

**2. The Court Below Misinterpreted *Norris* When It Granted Retroactive Relief**

The court of appeals recognized that, in *Norris*, this Court "made clear that it considers a judgment in a Title VII pension benefit case to have retroactive effect when that judgment, though applicable only to persons retiring after its date, affects a portion of benefits attributable to contributions made prior to its date." (Pet. App. at 4a.) Nevertheless, the court of appeals ignored this Court's determination that an award of retroactive relief "would be both unprecedented and manifestly unjust." 103 Sup. Ct. at 3509.

The court below felt that this Court proscribed retroactive application of the *Norris* decision only because it

found that retroactive application of the decision would have a serious impact "upon the employer or the plan." (Pet. App. at 7a.) The court thus disregarded the burden placed by its decision on all male participants in the plan, perhaps because they were not parties there. This failure to consider the effect of its decision in taking from one group and giving to another has no basis in reason, in this Court's decisions in *Manhart* and *Norris*, or in the policies underlying those decisions.

In *Manhart*, this Court first indicated a special sensitivity to the unique nature of insurance and pension plans and determined that a mandated change in the basis for the operation of a pension plan should be prospective only, reversing the decision of the lower court on this question. In rejecting a back-pay award to women employees, the Court underscored the harmful effects and substantial inequities that result when retroactive relief is awarded with respect to a pension obligation.[1]

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[1] In *Manhart*, the Court wrote that rules applicable to pension plans should not be applied retroactively "unless the legislature has plainly commanded the result." 435 U.S. at 721. Far from plainly commanding the retroactive relief ordered by the court below, Congress has given every indication that it also is sensitive to the unique character of pension plans, and it has identified and underlined the importance of making only gradual and prospective changes in the rules governing those plans. In passing the Employment Retirement Income Security Act of 1974, 88 Stat. 829, Congress paid careful attention to the problem of retroactivity and set a wide range of effective dates for various provisions of the new law; some of the rules did not become fully effective until this year, a decade after the law was enacted. *See, e.g.*, 29 U.S.C. § 1061(a) (1970 ed. Supp. V) (Sept. 2, 1974); 29 U.S.C. § 1031 (b)(1) (1970 ed. Supp. V) (Jan. 1, 1975); 29 U.S.C. § 1086(b) (1970 ed. Supp. V) (Dec. 31, 1975); 29 U.S.C. § 1114(c)(4) (1970 ed. Supp. V) (June 30, 1977); 29 U.S.C. § 1381(c)(1) (1970 ed. Supp. V) (Jan. 1, 1978); 29 U.S.C. § 1061(c) (1970 ed. Supp. V) (Dec. 31, 1980); 29 U.S.C. § 1114(c) (1970 ed. Supp. V) (June 30, 1984).

In *Norris*, this Court again rejected a lower court's award of retroactive relief. The relief which had been granted by the lower court in *Norris* was precisely like that affirmed by the Second Circuit in this case—that is, all future annuity payments to women were to be made equal to those made to men. Justice Powell, writing for the Court, stated that such relief was "fundamentally retroactive in nature," for "[a]nnuity payments are funded by the employee's past contributions and represent a return on those contributions." 103 Sup. Ct. at 3509-3510, n.10. The authoritative nature of this reference to the "[a]nnuity payments" receivable by male policyholders was completely overlooked by the court below.

Obviously, the decisions in *Manhart* and *Norris* reflect something more than a concern for the burdens imposed upon a plan or employer by retroactive relief; in fact, both decisions indicate an appreciation of the expectations of the insureds and a concern for the unwarranted imposition of the burdens of retroactive relief on "innocent third parties," such as men who have participated in the TIAA-CREF plan.

The Second Circuit's focus on the burden of retroactive relief upon employers or pension plans ignores the reason for this Court's refusal to impose such a burden, which is to protect the expectations of the many thousands of plan participants. There is no sound basis on which to refuse an indirect threat to those expectations through the imposition of retroactive relief upon a pension plan, while permitting a direct threat by requiring innocent plan participants to forego some portion of their anticipated benefits in order to accommodate unforeseen mandated changes in the operation of the plan.

### 3. The Court Below Clearly Expressed A Need For A Clarification of *Norris*

The court of appeals, directed to reconsider its decision in light of this Court's decision in *Norris*, openly expressed uncertainty and confusion as to the applicability of the *Norris* rule to grants of retroactive relief in cases involving pension plans. (Pet. App. at 7a.) Indeed, the court of appeals reinstated its prior decision only on the basis of what it presumed to be the most "plausible interpretation" of the *Norris* decision. *Id.*

This Court has more than once granted certiorari to consider the proper scope of its holding in another Title VII case, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), the Court granted certiorari "to consider important questions raised by this case regarding the exact scope of the prima facie case under *McDonnell Douglas* and the nature of the evidence necessary to rebut such a case." *Id.* at 569. Five months later, in *Board of Trustees of Keene St. Col. v. Sweeney*, 439 U.S. 24, 25 (1978), the Court found that a lower court had "imposed a heavier burden on the employer than *Furnco* warrant(ed)", and again handed down a clarifying opinion.

This case, as did *Furnco*, raises important questions about a prior decision of this Court; as in *Board of Trustees of Keene St. Col.*, this case presents a situation where the lower court has imposed a burden heavier than that warranted by a previous decision of this Court. The significance of the burden imposed by the Second Circuit's interpretation of *Norris*, and the far-reaching impact of the decision, are persuasive evidence of the need for a clarifying opinion.

**4. The Decision Below Conflicts With the Decision of Another Court of Appeals On the "Employer" Question, and Presents the Insurance Industry With Confusion and Uncertainty On Both the "Employer" and McCarron-Ferguson Act Questions**

Even apart from the potential economic effect of the retroactive relief ordered below, the decision of the court of appeals confronts the entire insurance industry with confusion and uncertainty in two respects.

**a. *The "Employer" Question***

First, the court below affirmed a radical expansion in the scope of Title VII by permitting its application to independent third party insurers such as petitioners. The Second Circuit's holding that TIAA-CREF "are so closely intertwined" with the universities which adopt retirement plans with policies written by TIAA-CREF as to deem the insurers "employers" within the meaning of Title VII (Pet. App. at 24a) is in direct conflict with the Sixth Circuit's holding in *Peters v. Wayne State University*, 691 F.2d 235 (1982). In *Peters*, the court reversed a finding that TIAA-CREF were "employers" subject to Title VII, correctly noting that TIAA-CREF were merely insurance companies providing a service to educational institutions, and adding that "[a]n insurance company is not bound by Title VII because it furnishes its services to a Title VII employer." (Pet. App. at 154a.)

It is, of course, clear that TIAA-CREF had nothing to do with hiring the employees of Long Island University, and that it has no power to fix their pay, or to terminate their employment. In such a situation, the English language is not broad or flexible enough to make TIAA-CREF an employer of these persons, who are clearly employees of Long Island University and not of its wholly independent and separate insurance carrier.[2]

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[2] This Court's recent decision in *Washington Metropolitan Area Transit Authority v. Johnson*, No. 83-747 (June 26, 1984), is not

The conflicting decisions in the Second and Sixth Circuits present a substantial problem to insurance companies, which calculate the rates they charge and the benefits they pay with reference to the risks they expect to bear. The ability of insurance companies to measure their exposure to risk is now significantly hampered by the uncertainty as to whether they become subject to Title VII merely by their association with Title VII employers. The confusion generated by the conflicting decisions in the courts of appeals on this issue should be resolved.

### b. *The McCarran-Ferguson Act Question*

The second area of uncertainty raised by the decision below is the Second Circuit's application of Title VII to the business of insurance despite the McCarran-Ferguson Act's explicit reservation of regulatory authority in this area to the states. The Second Circuit has thus interpreted Title VII in a manner which "revolutionize(s) the insurance and pension industries" without any regard to the care taken by this Court to avoid precisely such a result. *Manhart*, 435 U.S. at 717.

No insurance company was a party to *Manhart*, which involved an employer-operated plan, or to *Norris*, which involved a state-administered plan. The court below was

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applicable here. In that case, a broad construction was given to the word "employer" when a contractor was held to be entitled to the protection given to an employer under a workmen's compensation statute. There the contractor had provided insurance coverage for all employees, including those of subcontractors. The Court held that the contractor, having provided the protection for all employees on the project, was entitled to the corresponding protection given by the statute to employers. The distinction lies in the fact that the decision in no way indicates that the *insurance carrier* was the employer of the subcontractor's employees.

therefore acting without any actual decision by this Court when it decided that Title VII could pre-empt state regulatory authority over the business of insurance. (Pet. App. at 29a.)

The McCarran-Ferguson Act was passed in response to this Court's decision in *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), in which the antitrust laws were held applicable to the business of insurance. In the wake of that decision, there was considerable uncertainty in the insurance industry concerning the validity of state insurance laws, and "[s]ome insurance carriers were reluctant to comply with state regulatory authority, fearing liability for their actions." *Norris*, 103 Sup. Ct. at 3507, n.5 (citing H.Rep. No. 143, 79th Cong., 1st Sess., 2 (1945)). Congress resolved that uncertainty in the McCarran-Ferguson Act by declaring "that the continued regulation and taxation by the several states of the business of insurance is in the public interest . . ." (15 U.S.C. § 1011 (1982)), and that "No Act of Congress shall be construed to invalidate . . . any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act *specifically* relates to the business of insurance." 15 U.S.C. § 1012(b) (1982) (emphasis supplied).

Now, the very uncertainty which, in part, prompted Congress to pass the McCarran-Ferguson Act again confronts the insurance industry as a result of the decision below. Insurance carriers must once again assess their liability under federal law for complying with state insurance regulations, just as they did in the wake of *South-Eastern Underwriters*; the inevitable undermining of state authority in this area is directly contrary to the clearly expressed intent of Congress in passing the McCarran-Ferguson Act.

The uncertainty resulting from the decision below and its conflict with the decision of another court of appeals and with the purpose and policy of a federal statute are

all evidence of the need for review of the Second Circuit's decision.

## CONCLUSION

For the reasons set forth above and for the additional reasons advanced in the Petition in this case, the Petition should be granted.

Respectfully submitted,

ERWIN N. GRISWOLD
(Counsel of Record)
MARIANNE CORR
JONES, DAY, REAVIS & POGUE
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 879-3898
*Counsel for the Amicus*

*Of Counsel:*
LINWOOD HOLTON
Vice President & General Counsel
JACK H. BLAINE
Chief Counsel, State
EDWARD J. ZIMMERMAN
Associate General Counsel
AMERICAN COUNCIL OF LIFE INSURANCE
1850 K Street, N.W.
Washington, D.C. 20006-2284
(202) 862-4000

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